

Application for Review again mischaracterized the facts and circumstances surrounding TKR's A La Carte offerings, and again misapplied the Commission's standards.

The BPU has resurrected these spurious contentions, which now requires TKR to defend its Hamilton A La Carte offerings in two different Commission proceedings. TKR already has fully justified its Hamilton A La Carte offerings in the proceeding on appeal of the BPU's August 17, 1994 local rate orders. In the appeal proceeding, TKR filed a Petition which highlighted the Hamilton system as the primary example of TKR's compliance with the A La Carte standards. Because TKR's Petition in the appeal proceeding fully responds to the BPU's rehashed arguments in the instant LOI proceeding, TKR has attached its Petition for Review as an Exhibit to this Opposition. TKR's Petition for Review makes clear beyond any doubt that its offerings for the Hamilton system (and for its other systems) is not a "clear" violation of the FCC's A La Carte rules.⁹ The Bureau therefore correctly held that TKR may treat its Hamilton package as a New Product Tier.

Orders of State of New Jersey Board of Public Utilities,
"Opposition of New Jersey Board of Public Utilities, Office of
Cable Television, to Petition for Review of Local Franchising
Authority Orders," (filed Sept. 21, 1994).

⁹See, in particular, TKR's Petition at 13-36.

B. The Commission Need Not Defer to Local Franchising Authority A La Carte Determinations

The BPU argued in its Application that the Commission must defer to the A La Carte determinations of local franchising authorities, like itself.¹⁰ According to the BPU, the FCC frequently has held that the standard of review is whether "there is a reasonable basis for the local franchising authority's decision."¹¹ Although appropriate for most local franchising authority determinations, this standard of review does not apply to A La Carte issues. In these instances, the Commission made clear it would reach its own determination on A La Carte offerings:

One exception to the general rule of deference relates to Commission review of local franchising authorities' decisions as to whether an "a la carte" package is subject to rate regulation as a cable programming services tier. In this situation, the Commission will defer to the local authority's findings of fact if there is a reasonable basis for those findings. The Commission, however, will apply its own analysis of FCC rules and precedent to those facts to determine the appropriate regulatory status of the tier in question.¹²

¹⁰Application at 11.

¹¹Id.

¹²May 6, 1994 "Questions and Answers on Cable Television Rate Regulation," Response to Question 18. See also Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 74 RR 2d 1077, at 1117, ¶ 199 (rel. Mar. 30, 1994) ("Second Reconsideration"); "Century Southwest Cable Television, Santa Monica, California, Appeal of Local Rate Order of City of Santa Monica, California," Order, FCC File No. DA 95-123 (Cable Services Bureau, rel. Jan. 31, 1995).

C. TKR's A La Carte Package Includes Only a Small Number of Channels

Because TKR's A La Carte offerings for its Hamilton system are not in "clear" violation of the A La Carte test, Paragraph 51 of the Sixth Reconsideration allows TKR to treat its package as a NPT provided that its package "involves only a small number of regulated channels."¹³ Although the BPU does not address this issue, it is clear that the four channels at issue in the Hamilton LOI proceeding constitute a small number of channels. TKR performed a survey of the approximately 39 LOI A La Carte orders issued to date by the Cable Services Bureau. Of these, approximately 29 A La Carte packages were approved. Nineteen of the 29 which were approved involved A La Carte packages of four or more channels. Several packages included as many as six A La Carte channels. Thus, approval of the four-channel package at issue in the Hamilton LOI proceeding is consistent with prior Bureau decisions.

D. TKR's Subscribers are Expecting Neither a Retiering or a Refund

One novel argument offered by the BPU for overturning the Hamilton LOI Order is that, contrary to the conclusion of the LOI Order, TKR's subscribers are expecting refunds and a retiering.¹⁴ In fact, however, TKR's

¹³Sixth Reconsideration at ¶ 51.

¹⁴Application at 17.

subscribers are expecting neither, as TKR has made clear in communications with its subscribers.

E. Oral Argument is Unnecessary and Costly

Finally, the BPU's request for oral argument should be rejected. TKR respectfully contends that written submissions in this and the appeal proceeding are more than adequate for the Commission to reach a determination on the Hamilton A La Carte package. As evidenced by the volume of paperwork generated to date, substantial TKR resources have already been expended to help the Commission resolve this issue. Moreover, the BPU made its request pursuant to Section 1.297 of the rules, which deals only with hearing proceedings pursuant to Subpart B of the rules. This proceeding has not been designated for hearing.¹⁵

II. CONCLUSION

Wherefore, for the foregoing reasons, and for the reasons articulated in the Petition for Review attached to this Opposition, TKR respectfully requests the Commission to


¹⁵Section 1.423 is also inapplicable, since it pertains only to rulemaking proceedings.

affirm the Cable Services Bureau's November 25, 1994
Hamilton LOI Order, and to reject the BPU's request for oral
argument.

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EXHIBIT

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

TKR CABLE COMPANY

**Petition for Review of
Rate Orders of
State of New Jersey
Board of Public Utilities**

Docket No. _____

**PETITION FOR REVIEW
OF LOCAL FRANCHISING AUTHORITY ORDERS**

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SUMMARY OF ARGUMENT

The BPU's orders are fatally flawed because of numerous factual and other errors and because of the misapplication of Commission standards. The arbitrary and capricious nature of the BPU's orders is evidenced throughout by the BPU's incomplete, erroneous, and unfair factual analysis of TKR's rates. Reversible errors abound. In addition, flagrant disregard of numerous Commission standards, the selective, discriminatory employment of other Commission standards, and the egregious misapplication of Commission regulations has resulted in a penalty on TKR that is unjust and unfounded. Such inept and discriminatory administrative review reflects a gross abuse of agency discretion. In addition, the scant discussion of TKR's offerings indicates the BPU relied on less than substantial evidence and underscores the conclusion that its decisions are not the product of reasoned decisionmaking.

TKR's A La Carte offerings fully comply with Commission standards adopted to evaluate those offerings in both the May 3, 1993 Rate Order and the March 30, 1994 Revised Benchmark Order. To avoid retroactive ratemaking and to comply with Commission pronouncements and regulations, the standards of the Rate Order should apply to TKR's refund liability for the period September 1, 1993 to

May 15, 1994. In all cases: (i) the price of the A La Carte package does not exceed the sum of the channel prices; (ii) the individual channels are provided separately; and (iii) TKR has provided consumers with realistic service choices. Regarding the standards adopted by the Revised Benchmark Order, TKR's extensive, complete analysis of all of these standards, including the fifteen factors enumerated therein, demonstrates beyond question that TKR has complied fully with the requirements of that Order as well.

The BPU's analysis of TKR's A La Carte service offerings is not only unfair standing alone, it also is highly discriminatory compared with an order issued by the BPU, dated the same date, approving A La Carte offerings made by Adelphia Cable Communications. The ease with which Adelphia's noncompliance with certain A La Carte factors was dismissed by the BPU contrasts sharply with the BPU's rigid application of a select few of these factors in the case of TKR. In addition, in both cases the BPU failed to engage in a thorough analysis of all A La Carte considerations.

The BPU further erred in requiring TKR to use an inflation adjustment of 122.5 in setting rates. TKR is instead entitled to use 121.8, which is the figure current at the time TKR set its rates.

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**Before the
Federal Communications Commission
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In the Matter of

TKR CABLE COMPANY

**Petition for Review of
Rate Orders of
State of New Jersey
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Docket No. _____

**PETITION FOR REVIEW
OF LOCAL FRANCHISING AUTHORITY ORDERS**

Pursuant to Section 623(a)(5) of the Communications Act, as amended, 47 U.S.C. §543(a)(5), and Section 76.944 of the regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. §76.944, TKR Cable Company ("TKR"), by its attorneys, hereby files this Petition for Review of rate orders issued by the State of New Jersey Board of Public Utilities ("BPU", formerly known as the Board of Regulatory Commissioners)¹. Specifically, TKR petitions for review of those BPU orders setting initial rates for the following TKR systems:
Elizabeth, Hamilton, Old Bridge, Ramapo, Rockland, Tri-

¹These orders were released subsequent to a BPU meeting held August 17, 1994. TKR's copy of the orders were postmarked August 22, 1994 and received August 23, 1994.

System, Warwick, and Wildwood.² Concurrently with this Petition for Review, TKR is filing a Petition for Stay of these BPU orders. In support of this Petition for Review, TKR states as follows:

I. BACKGROUND

A. Pre-BPU Orders

On December 13, 1993 the Commission issued a Letter of Inquiry (File No. LOI-93-31) on TKR's A La Carte practices for TKR's Hamilton system. TKR responded to this Letter of Inquiry on January 18, 1994. On February 25, 1994, TKR's A La Carte offerings were attacked again, this time by the State of New Jersey Board of Regulatory Commissioners Office of Cable Television ("OCT"). The OCT filed complaints with the Commission on behalf of several New Jersey communities taking issue, inter alia, with TKR's A La Carte offerings.³ TKR responded to these complaints on March 28, 1994. Subsequently, the OCT filed with the Commission a request for expedited review of several of these complaints by letter dated April 8, 1994.

TKR's first Petition for Stay was filed May 16, 1994, in Docket No. DA 94-691. In that petition, TKR

²These orders are attached to this pleading as Attachment a.

³The TKR systems affected by these complaints are those at issue in this proceeding. They include Elizabeth, Ramapo, Rockland, Tri-System, Warwick and Wildwood. Old Bridge is part of Tri-System. Hamilton was already the subject of a prior complaint.

requested the Commission to preclude the BPU (therein referred to as the "OCT") from making an independent determination on TKR's A La Carte issue until the Commission has an opportunity to decide the matter.

On June 23, 1994, the Chief, Cable Services Bureau ("Bureau"), acting on delegated authority from the Commission, denied TKR's initial stay request.⁴ The Bureau determined that TKR's petition should be denied "mainly" because TKR had failed to establish the second prong of the four-prong test for stays, *i.e.*, that TKR would suffer irreparable harm if its petition were denied.⁵

On July 18, 1994, TKR filed an Application for Review of the Bureau's June 23 Order. In its Application for Review, TKR noted that stays had been issued in five other proceedings where A La Carte determinations were at issue.⁶ TKR argued, *inter alia*, that in denying its petition for stay, the Bureau violated the longstanding

⁴TKR Cable Company, "Order," Docket No. DA 94-691 (June 23, 1994) ("June 23 Order").

⁵June 23 Order, at ¶ 3.

⁶See Century Southwest Cable Television Corp., Docket No. DA 94-463 (Petition for Stay of Local Rate Order of City of Beverly Hills, CA) (May 9, 1994); Comcast Cablevision of Tallahassee, Inc., Docket No. DA 94-445 (Request for Stay of a Local Order of the City of Tallahassee Pending Appeal) (May 9, 1994); Warner Cable Communications, Inc., Docket No. DA94-511 (Petition for Stay of Local Rate Order of City of Wadsworth, OH) (May 17, 1994); Century Cable of Southern California, Docket No. DA 94-512 (Petition for Stay of Local Rate Order of City of Brea, CA) (May 17, 1994); and Century Cable of Southern California, Docket No. DA 94-513 (Petition for Stay of Local Rate Order of City of La Habra, CA) (May 17, 1994).

principle that similarly situated parties must be treated similarly. The OCT filed its Opposition to TKR's Application for Review on August 2, 1994. TKR filed a Reply to this Opposition on August 15, 1994, requesting that the Commission act expeditiously on TKR's Application for Review.

B. The BPU Orders.

The BPU orders that are the subject of this Petition, taken collectively, require refunds in the amount of \$5,235,497 for the twelve-month period beginning September 1, 1993. TKR's monthly refund liability until it revises its rates is \$436,290.⁷ The refund liability is due primarily to the BPU's determination in each of the orders that the A La Carte offerings of TKR should be a regulated tier.

Each of the BPU orders at issue are remarkably similar. They reach identical findings for each of the systems and use identical language to make those findings. The only difference between the orders is the BPU's slight treatment of specific facts to tailor the orders to fit each particular system. Because of these similarities, separate

⁷Although the orders attempt to hold TKR liable for these amounts, that TKR, pursuant to Section 76.922(b)(6)(ii), can only be ordered liable for refunds for the period September 1, 1993 to May 15, 1994. See discussion of this issue, *infra*. Refunds calculated pursuant to BPU holdings for this eight and one-half month period amount to \$3,708,477.

review of each order is unnecessary. Instead, because the Hamilton system is the subject of the outstanding Letter of Inquiry, TKR will mainly cite the BPU's Hamilton order, with references as necessary to issues raised by the other orders.

The actions taken by the BPU in each of the orders at issue were nearly identical. The ordering paragraphs contained in all of the orders require TKR: (i) to submit to the BPU, within 15 days of the August 17, 1994 (or September 1, 1994) date of the orders (which is only eight days after the date TKR received the orders) a final Form 393 and any necessary tariff changes, along with an "accounting for any refunds"; (ii) to conform its tariff and billing procedures "effective immediately; (iii) to reduce its basic service rates to a certain charge; and (iv) to implement these reduced rates "in the next practicable billing cycle" with appropriate notice given to customers.⁸

In all of the orders, the BPU: (i) found that TKR's equipment charges were reasonable; (ii) found that TKR's installation charges were reasonable;⁹ and (iii) required TKR to clarify its tariff regarding the conditions under which TKR will charge customers for repairs on company

⁸See, e.g., the ordering paragraphs at the BPU Hamilton order, page 7.

⁹In the BPU's Rockland order, the BPU found TKR's revised rates, submitted August 2, 1994 at the request of BPU Staff, to be reasonable. BPU Rockland Order at 3-4.

owned equipment in cases where customers have tampered with such equipment. Furthermore, for systems where the BPU decided the issue arose, the BPU deferred its consideration of a potential "buy-through" violation by TKR. The BPU explained that this deferral of "buy-through" considerations is the result of insufficient time to consider fully the matter. Further, the BPU stated that some New Jersey cable systems "might have to engage in significant channel realignments and take other actions that may result in customer confusion and the imposition of additional fees and equipment."¹⁰

Each of the orders uses the same language purporting to explain Commission standards for evaluating A La Carte offerings. After purporting to explain these standards, the BPU lists four conclusory considerations as rationale for its adverse A La Carte determination. These four conclusory considerations are: (1) the A La Carte channels were removed from regulated tiers; (2) the package price is deeply discounted; (3) the A La Carte offerings constitute an avoidance of a rate reduction; and (4) a "significant" equipment charge is required to purchase an individual channel.¹¹

¹⁰See, e.g., BPU Hamilton order at 4.

¹¹The BPU Elizabeth order does not list the "significant" equipment charge criterion and thus includes only three.

In listing conclusory consideration number (1), the BPU claims that one (or more) of each TKR system's A La Carte channels was removed from the basic service tier.

In every rate order, the BPU stated that after review of TKR's basic rates for the system in question, TKR "used incorrect basic rates, subscriber numbers, equipment revenues and inflation adjustments in its Form 393."¹² The BPU offered in their place "correct" rates, subscriber numbers, and equipment revenues. The inflation adjustment offered as "correct" by the BPU is 122.5.

The ordering paragraphs also require TKR to "refund all overcharges to subscribers in excess of the maximum permitted rates as established herein from September 1, 1993 until Petitioner [TKR] revises its rates in accordance with this Order."

II. ARGUMENT

A. The Profusion of Factual and Other Errors and the Misapplication of Commission Standards Compel Rejection of the BPU Orders.

The BPU's analysis of TKR's A La Carte offerings is incomplete, full of flaws, will conflict with the FCC's as yet unissued decisions on the Letters of Inquiry, and unfairly ignores all considerations favorable to TKR. As such, the BPU's orders regarding TKR's A La Carte offerings

¹²See, e.g., BPU Hamilton order at 2.

are arbitrary and capricious and represent a clear abuse of agency discretion.¹³

The BPU's unbalanced, blunt assault on TKR's A La Carte offerings and rates in general will produce customer confusion and an unsubstantiated, unfair penalty on TKR's cable systems.

The arbitrary and capricious nature of the BPU orders is evidenced throughout. The orders reflect a singleminded effort to reduce TKR's rates regardless of the facts. In avoidance of a fair, balanced scrutiny of TKR's A La Carte offerings, the BPU lists only one-third of the Commission's fifteen A La Carte factors. Only a select few of the numerous guidelines required by the Commission to be considered were relied upon by the BPU. The others were not at all analyzed and, incredibly, most were not even mentioned. The selective nature of the BPU's analysis is glaringly apparent in its failure to analyze three of the five A La Carte factors the BPU even bothered to mention. Cherry-picking what it deems unfavorable considerations without reference, much less discussion, of most remaining factors is not the product of balanced and reasoned decisionmaking. It is instead a blatant abuse of agency discretion.

Further evidence of the arbitrary and capricious character of these orders is the BPU's careless, repeated

¹³See Administrative Procedure Act, 5 U.S.C. §706.

misstatements of the "correct" basic rates and "correct" subscriber numbers. Although the BPU maintains the numbers originally used by TKR are incorrect, the numbers ultimately plugged into the analysis by the BPU are in nearly all cases the numbers provided by TKR itself in its Form 393 filings.¹⁴ The BPU repeats this error for every one of the TKR systems subject to this Petition for Review. In addition, the number offered by the BPU in all of the orders for the "correct" monthly equipment revenue is, like all the other numbers offered by TKR as "correct", unsubstantiated, since no explanation is provided of how it was determined.

Of enormous concern to TKR, and further reflective of the poor quality of the BPU's review, is the misstatement in each of the orders that one or more of TKR's A La Carte offerings was removed from TKR's basic service tier. Had the BPU performed its review of TKR's rates with even a minimum of care, the BPU would have known that TKR's A La Carte offerings had all been removed from cable programming services tiers, with the exception of the station WTBS service offering for Tri-System (including Old Bridge) and Elizabeth. The extent of this error is illustrated by TKR's Warwick system. In its Warwick order, the BPU claims that all four of Warwick's A La Carte channels were removed from

¹⁴The subscriber numbers for Old Bridge and Tri-System were separated by the BPU. The total for each was combined on TKR's Form 393s since Old Bridge is part of Tri-System. The "correct" rate for Hamilton is not the current rate listed on Hamilton's Form 393, but rather is a rate charged subsequently by Hamilton.

its basic service tier. In fact, not a single one of Warwick's A La Carte channels came from basic.¹⁵ Of additional concern, and compounding these errors, the BPU wrongly identified the A La Carte offerings of TKR's Rockland system.¹⁶ Identification of the very programming being offered on an A La Carte basis, and identification of the service tier from which A La Carte channels are removed, are fundamental considerations lying at the heart of any regulatory analysis of an A La Carte rate evasion. These mistakes of the BPU are not merely sloppy, they constitute reversible error, providing clear evidence of a judgment rendered by the BPU with inaccurate information.

The confusing and unreasonable nature of the ordering paragraphs is further evidence of the careless, arbitrary and capricious nature of the BPU's determinations. The BPU has provided conflicting instructions to TKR regarding when TKR's rate revisions must be implemented. The BPU's instructions in these paragraphs require that certain similar actions be taken by TKR, but at three different times. TKR must: (i) submit to the BPU, within 15 days of the August 17, 1994 date of the orders (which is only eight days after the date TKR received the orders) a

¹⁵WTBS was removed from the Expanded Tier, and AMC, MSG and TNT were removed from the Advantage Tier.

¹⁶The BPU identified Rockland's A La Carte offerings as: CNN, MSG, TNT, TBS and Discovery. Rockland's A La Carte offerings instead are: CNBC, AMC, TNT, WTBS and Discovery.

final Form 393 and any necessary tariff changes; (ii) conform its tariff and billing procedures "effective immediately; and (iii) implement reduced rates "in the next practicable billing cycle."

Contradictory instructions seem a small mistake compared with the gross overreaching attempted by the BPU in ordering refunds from TKR. In its ordering paragraphs, the BPU attempts to make TKR liable for refunds far in excess of what TKR may legally be ordered to pay. The ordering paragraphs state that TKR must "refund all overcharges to subscribers in excess of the maximum permitted rates as established herein from September 1, 1993 until Petitioner [TKR] revises its rates in accordance with this Order." However, since TKR complied with the Commission's refund deferral provisions, Section 76.922(b)(6)(ii) of the Commission's regulations,¹⁷ the BPU may order refunds only for the period from September 1, 1993 to May 15, 1994.

This overreaching by the BPU constitutes an outrageous abuse of agency discretion. One may consider that this overreaching may only have been yet another mistake by the BPU. But granting the BPU the benefit of this doubt still provides perhaps the strongest evidence yet of its incompetent handling of TKR's rates.

Finally, the BPU appears unaware of the Commission requirement that any refunds ordered for the period prior to

¹⁷47 C.F.R. §76.922(b)(6)(ii).

May 15, 1994 must be evaluated under standards adopted in the May 3, 1993 Rate Order.¹⁸ This retroactive ratemaking issue is discussed infra.

In addition to the arbitrary and capricious nature of the BPU's orders, the agency's scant, simplistic analysis of TKR's A La Carte offerings reveals that it has not relied upon substantial evidence in making its determinations.¹⁹ As discussed infra, there is much information regarding the nature of TKR's offerings and the motivations for its decisions which were not considered by the BPU.

The BPU's purported explanation of Commission standards used to evaluate A La Carte offerings is substantially incomplete and misleading. For instance, of the fifteen factors cited by the Commission in the March 30, 1994 Revised Benchmark Order²⁰ for evaluating A La Carte offerings, the BPU cites only five. The BPU lists the five factors which make regulation inappropriate, but fails even to mention the other ten factors to consider before deciding

¹⁸Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, "Report and Order and Further Notice of Proposed Rulemaking," MM Docket No. 92-266, 8 FCC Rcd 5631 (Released May 3, 1993) ("Rate Order").

¹⁹See Administrative Procedure Act, 5 U.S.C. §706.

²⁰Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, "Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking," MM Docket No. 92-266 (Released March 30, 1994) ("March 30 Revised Benchmark Order" or "March 30 Order").

whether a system's A La Carte offerings should be regulated. Further, the BPU misstates the first of the five factors.²¹

The BPU not only fails to mention most of the factors necessary to determine the fate of A La Carte offerings, it completely ignores the many facts about TKR's A La Carte offerings which support nonregulation of these offerings. The entire breadth of its "analysis" is a listing of four conclusory considerations purportedly "weighing in favor" of regulation, without balancing these considerations against other factors which might "weigh in favor" of nonregulation.

B. TKR's A La Carte Offerings Comply with Commission Standards.

1. Introduction

TKR's A La Carte offerings fully comply with the standards adopted by the May 3, 1993 Rate Order and with the fifteen factors furnished by the Commission in the March 30, 1994 Revised Benchmark Order, for evaluating the A La Carte offerings of cable operators. The compliance of TKR with these factors (along with other Commission standards for evaluating A La Carte offerings) provides convincing evidence that TKR's offerings should remain unregulated.

²¹The BPU ignores the Commission statement that if the operator had begun to explore offering A La Carte packages prior to rate regulation, that fact is supportive of no regulation.

TKR will explain below the various considerations relied upon by the Commission to determine the regulatory status of A La Carte offerings, and will demonstrate how TKR conforms with these considerations. TKR will primarily use its Hamilton system as an example, with reference to its other systems where appropriate. A copy of TKR's rate cards, channel line-ups, and/or OCT tariffs pre- and post-restructuring for all systems under review pre- and post-restructuring are attached as Attachment B.

2. Congressional Intent Under the 1992 Cable Act, and the Commission's May 3, 1993 Rate Order.

TKR's substantial efforts at restructuring its service offerings were designed to further the policies of Congress and the Commission, not escape them. As the House and Senate Reports on the 1992 Cable Act indicate, Congress found that per channel offerings enhance customer choice and encourage competition. For these reasons, Congress encouraged unbundling of service offerings.²² With these goals in mind, TKR unbundled some of its services and provided for limited A La Carte offerings.

Consistent with general Congressional directives outlined in the 1992 Cable Act²³ the Commission stated in

²²See H.R. Rep. No. 628, 102d Cong., 2d Sess. 90 (1992); S. Rep. No. 92, 102d Cong., 2d Sess. 77 (1991).

²³Communications Act of 1934, as amended, §§ 623(a)(1), (f) and (h), 47 U.S.C. §§ 543(a)(1), (f) and (h).

the May 3, 1993 Rate Order that it would decline to regulate collective offerings of A La Carte services otherwise exempt from regulation if two conditions were met: "First, the price for the combined package must not exceed the sum of the individual charges for each component service," and "[s]econd, the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the collective offering."²⁴ In a footnote, the Commission added that the second condition of continuing to offer separately the services in the collective offering could only be satisfied if "the per channel offering provides consumers with a realistic service choice."²⁵

The Commission indicated in the Rate Order that rate evasions through transfers of programming to A La Carte offerings may be rare, since no evidence existed that operators would, or even could, make such a shift.²⁶ The Commission added that consumers would act as a check on such A La Carte shifts, since consumers are able to "choose or veto such programming on an individual channel or program basis."²⁷ The Commission recognized that market forces can be relied upon to ensure reasonable rates for unbundled

²⁴Rate Order, 8 FCC Rcd at 5836-37, ¶¶ 327-28.

²⁵Rate Order, 8 FCC Rcd at 5837, ¶ 328, n.808.

²⁶Rate Order, 8 FCC Rcd at 5916, n.1161.

²⁷Id.